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MCLE SELF-STUDY

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Profiting From Private Advertisements On Public Property

*By: Terence R. Boga, Esq.**

Introduction

Nationwide, cities and other government entities are generating revenue from private advertising on public property. Among other places, for example, municipalities have leased advertising space on buses,[1] bus shelters,[2] parking meters and trash cans.[3] School districts have made advertising space available on baseball field fences[4] and in student newspapers, yearbooks and athletic programs.[5] Transportation authorities have opened advertising space in subway and railroad stations.[6]

Unsurprisingly, proper implementation is crucial to ensure that a private advertising program serves as a productive fundraising venture rather than a drain on public coffers. Case law confirms that, in certain circumstances, government entities can incur civil rights liability by excluding a particular advertisement because of content. Moreover, public officials can lose their qualified immunity from damages liability by restricting advertisements on the basis of viewpoint.

This article explains the constitutional parameters that circumscribe municipal authority to use public property as a venue for private advertisements. Part I describes the cornerstone of this area of First Amendment law, Lehman v. City of Shaker Heights.[7] In Lehman, the United States Supreme Court established that private advertising programs may be conducted with content-based distinctions, a holding that effectively overruled a contrary prior decision by the California Supreme Court. Part II examines how lower courts have applied the Lehman principle in different contexts. As will be shown, the enforceability of content-based distinctions hinges on the public forum status of the property on which a private advertising program is conducted. Finally, Part III sets forth four strategies that cities should follow to profit from private advertisements on public property.

I. The Lehman Principle

The Lehman case arose when Harry J. Lehman, a 1970 candidate for the Ohio General Assembly, unsuccessfully attempted to purchase "car card" space in the rapid transit system operated by the City of Shaker Heights. Lehman's proposed ad copy contained his picture and professed his belief in honesty, integrity and good government. Metromedia, Inc., which managed advertising on the transit system pursuant to a contract with Shaker Heights, rejected Lehman's submission despite the availability of space. The exclusion rested entirely on the management agreement's

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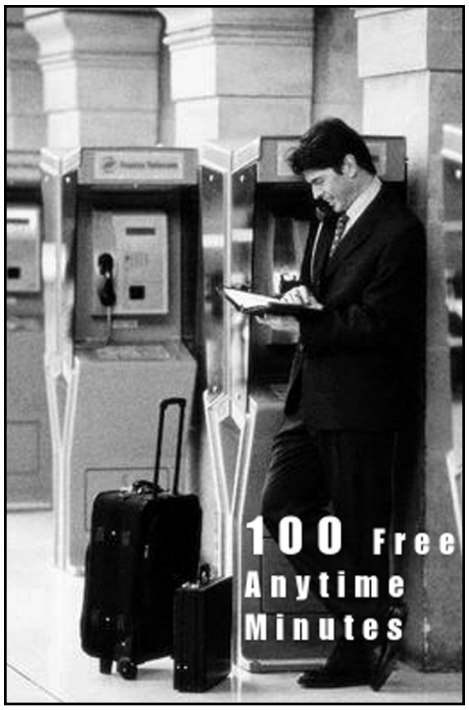
prohibition on political advertising, a ban that had been consistently enforced for twenty-six years.

In a 5-4 decision, the United States Supreme Court held that neither Shaker Height's policy against political advertising in car cards, nor the refusal to accept Lehman's campaign copy, violated the First Amendment. Lehman had argued that the car cards constituted a public forum such that nondiscriminatory access was required. The plurality opinion (representing Chief Justice Burger and Justices Blackmun, Rehnquist and White) categorically rejected this contention, however, deeming the car cards to be a part of the city's public transportation commercial venture. The plurality stressed that the political advertising restriction served to minimize chances of abuse, the appearance of favoritism and the risk of imposing upon a captive audience. These considerations, the plurality concluded, justified the "managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising."[8]

Justice Douglas provided the fifth vote for the Court's judgment. He agreed with the plurality that the sale of advertising space did not convert the car cards into a forum for communication. Unlike the plurality, though, he would have disposed of the case solely on the ground that commuters have a right "to be free from forced intrusions on their privacy."[9]

The Lehman case effectively overruled a contrary decision made seven years prior by the California Supreme Court in Wirta v. Alameda-Contra Costa Transit Dist.[10] The question raised in Wirta was whether a transit district constitutionally could limit the paid advertising on its motor coaches to commercial solicitations and to issues and candidates on the ballot at the time of an election. By a 4-3 vote, the Wirta court ruled that such a restriction amounted to a "most pervasive form of censorship" in violation of the First Amendment rights of persons seeking to display an anti-Vietnam War advertisement.[11] This determination apparently contributed to the grant of certiorari in Lehman.[12] Thus, although Lehman does not expressly disapprove of Wirta, it seems undeniable that the High Court intended to invalidate the California Supreme Court's inconsistent ruling.



II. Private Messages in Public Bottles

The contradictory outcomes of Lehman and Wirta stem from fundamentally distinct attitudes as to the nature of private advertising space on public property. For the Wirta court, such space comprised a "forum for the expression of ideas."[13] By contrast, in the opinion of the Lehman plurality, "[n]o First Amendment forum is here to be found."[14] Ironically, decades later, this conceptual dichotomy continues to be determinative as lower courts have applied the Lehman principle in different contexts.

First Amendment jurisprudence presently classifies public property according to three categories of public forum status. This taxonomy, as delineated in the landmark case of Perry Ed. Assn. v. Perry Local Ed. Assn.,[15] consists of: (1) traditional public forums - areas such as streets and parks that traditionally have been used for expressive activity; (2) designated public forums - areas dedicated by the government for expressive activity, either generally or for limited purposes; and (3) nonpublic forums.

Public forum status profoundly influences a government entity's authority to regulate private speech on public property. In both traditional and designated public fora, the government may only enforce a content-based speech restriction if it is necessary to serve a compelling state interest and also is narrowly drawn to achieve that interest.[16] By contrast, a content-neutral restriction on speech in a traditional or designated public forum is permissible provided it is narrowly drawn to serve a significant state interest and leaves open ample alternative channels of communication.[17] Nonpublic fora afford the government greatest regulatory latitude. A speech restriction in that context is valid as long as it is reasonable and viewpoint-neutral.[18]

For public property other than streets and parks, public forum status depends upon government intent. Stated differently, public property will be deemed a designated public forum if it has intentionally been opened for public discourse by the government; otherwise, the nonpublic forum classification will apply. The primary indicia of government intent are policy and practice, with the latter being the more significant of the two.[19] The selectivity with which the property has been made available to particular forms of expression, and the compatibility of expressive activity with the principal function of the property, also are relevant factors.[20]

Litigation over private advertising programs on public property tends to focus on the line between designated public forum and nonpublic forum, probably because streets and parks are rarely leased to advertisers. A recent state court example is DiLoreto v. Board of Education.[21] In this case, the California Court of Appeal sustained the Downey Unified School District's refusal to post, on a high school baseball field fence, a Ten Commandments advertisement submitted by local businessman Edward DiLoreto. The court largely justified its ruling on its conclusion that the fence constituted a nonpublic forum. This decision is particularly significant because the court utilized the First Amendment's public forum doctrine to resolve California Constitution-based free speech claims.

Perhaps surprisingly, of all the federal courts of appeals, the Ninth Circuit has deferred most to government entities by assigning the nonpublic forum classification to their private advertising spaces and acceding to their managerial decisions. This deference is reflected in the court's dismissal of Edward DiLoreto's First Amendment challenge to the Downey Unified School District's rejection of his Ten Commandments advertisement.[22] It is also demonstrated by decisions allowing the

City of Phoenix to exclude noncommercial advertisements from bus panels,[23] and permitting Nevada's Clark County School District to bar family planning service advertisements from student newspapers, yearbooks and athletic programs.[24]

Other federal jurisdictions have not compiled a comparable record. In 1995, for example, the Second Circuit characterized a Pennsylvania Station billboard as a nonpublic forum and sustained Amtrak's refusal to exhibit a political advertisement there.[25] Three years later, however, the court ruled that New York's Metropolitan Transportation Authority (MTA) had created a designated public forum in its bus panels such that it was obligated to display a political advertisement critical of New York City Mayor Rudolph Giuliani.[26] In an analogous case, the Sixth Circuit deemed Southwest Ohio Regional Transit Authority (SORTA) bus panels to be a designated public forum and reversed the exclusion of a labor union advertisement.[27] As a final example, the Third Circuit categorized Southeastern Pennsylvania Transportation Authority (SEPTA) subway and railroad station poster panels as a designated public forum and overturned the removal of an anti-abortion advertisement.[28]

What accounts for these disparate applications of the Lehman principle? The answer is the manner in which the government entity had conducted its private advertising program. Phoenix, the Downey Unified School District and Amtrak consistently limited their advertising spaces to commercial promotions. The Clark County School District continuously restricted its advertising spaces to subjects and entities considered to be in the best interests of its schools, and required advertisers to obtain approval from the principal having jurisdiction. By contrast, the MTA, SORTA and SEPTA all accepted a broad range of commercial and noncommercial messages in their advertising spaces. More than any other factor, this difference proved to be determinative of public forum status and, consequently, litigation outcome.

III. Program Implementation Strategies

Any government entity that leases advertising space on its public property should expect to be presented with an advertisement that it will not wish to display due to aesthetics, politics or some other reason. As explained above, however, excluding an undesirable advertisement may violate the First Amendment rights of the prospective advertiser and result in civil rights liability. This dilemma can be resolved by implementing a private advertising program in accordance with the following four strategies.

First, the advertising space should formally be declared to be a nonpublic forum. The advantage of such a declaration is that it undercuts an argument, sure to be raised by a litigious rejected applicant, that the advertising space was intentionally opened for public discourse. Although unlikely to be dispositive of public forum status,[29] the mere existence of the declaration probably will tilt the scales (at least initially) against a designated public forum classification.

"Unsurprisingly, proper implementation is crucial to ensure that a private advertising program serves as a productive fundraising venture rather than a drain on public coffers."

Second, an eligibility policy should be established to restrict the types of advertisements that may be exhibited through the program. The choice of eligibility criteria must be informed by the realization that the courts will rely heavily upon the standards when evaluating the public forum status of the advertising space. Allowing only commercial advertisements indicates that making money is the main goal. By contrast, allowing both noncommercial and commercial advertisements suggests a general intent to open the space for public discourse.[30]

Eligibility criteria are only meaningful if they are unambiguous and definite. This prerequisite is illustrated by the First Circuit's denunciation of the Massachusetts Bay Transportation Authority (MTBA) for drafting a "scarcely coherent" policy regarding acceptable advertising for its subway and trolley cars.[31] Among other edicts, that policy required compliance with the MTBA's determination of "good taste, decency and community standards." The policy also forbade messages or representations "pertaining to sexual conduct," an exclusion that the court criticized for being too vague and broad in scope.

Third, the eligibility policy for the program should be consistently enforced. The Ninth Circuit has stressed that "consistency in application is the hallmark of any policy designed to preserve the non-public forum status of a forum."[32] If an eligibility policy is not enforced, or if exceptions are haphazardly permitted, then the policy will not have the desired effect of persuading a court that the advertising space is intended to be a nonpublic forum.

Fourth, and most importantly, an advertisement should never be excluded from the program because of the viewpoint that it advocates. Although government entities enjoy considerable latitude as to the regulation of private speech in a nonpublic forum, even in that context a restriction must be viewpoint neutral. The requirement of viewpoint neutrality is so paramount that the Ninth Circuit denied a qualified immunity claim by City of Victorville officials who were sued for civil damages for allegedly demanding removal of pro-union advertisements from bus shelters.[33] In language applicable to all private advertising programs, the court declared: "No fair reading of Lehman, upholding content discrimination neutral as to viewpoint on buses, could have led any reasonable official to think that viewpoint discrimination would have been permissible in bus shelters."[34]

Conclusion

Whether or not to lease advertising space on public property is a policy question as to which cities of course enjoy absolute discretion. Should a jurisdiction choose to conduct a private advertising program, the legal question that most likely will arise first is how can the city retain maximum control over the advertisements that are displayed on public

property? The answer, corroborated by a large body of case law, is simple: promulgation and consistent enforcement of a policy that identifies the advertising space as a nonpublic forum and prescribes objective eligibility criteria for participation in the program. Through such action, a city can ensure the profitability of its private advertising program by minimizing the civil rights liability exposure presented by its managerial decisions.

Endnotes

1. Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), cert. denied 526 U.S. 1131 (1999).
2. Metro Display Advertising v. City of Victorville, 143 F.3d 1191 (9th Cir. 1998).
3. Rappa v. New Castle County, 813 F.Supp. 1074 (D.Del. 1992), aff'd in part and vacated in part 18 F.3d 1043 (3rd Cir. 1994).
4. DiLoreto v. Board of Education, 74 Cal.App.4th 267 (1999) ("DiLoreto I"), rev. denied, Cal. Supreme Court Minute 12-01-1999; DiLoreto v. Downey Unified School Dist. Bd. Educ., 196 F.3d 958 (9th Cir. 1999) ("DiLoreto II"), cert. denied 529 U.S. 1067 (2000).
5. Planned Parenthood v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991).
6. Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242 (3rd Cir. 1998), cert. denied 525 U.S. 1068 (1999).
7. 418 U.S. 298 (1974).
8. Id. at 304.
9. Id. at 307.
10. 68 C.2d 51 (1967).
11. Id. at 56.
12. Lehman, supra note 7 at 301 n.5.
13. Wirta, supra note 10 at 55.
14. Lehman, supra note 7 at 304.
15. 460 U.S. 37 (1983).
16. Id. at 45-6.
17. Id.
18. Id. at 46.
19. Hopper v. City of Pasco, 241 F.3d 1067, 1075 (9th Cir. 2001).
20. Id. at 1078.
21. DiLoreto I, supra note 4.
22. DiLoreto II, supra note 4.
23. Children of the Rosary, supra note 1.
24. Planned Parenthood, supra note 5.
25. Lebron v. National R.R. Passenger Corp. (AMTRAK), 69 F.3d 650 (2nd Cir. 1995), amended by 74 F.3d 371 (2nd Cir. 1995), cert. denied 517 U.S. 1188 (1996).
26. New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123 (2nd Cir. 1998), cert. denied 525 U.S. 824 (1998)
27. United Food v. Southwest Ohio Regional Transit, 163 F.3d 341 (6th Cir. 1998).
28. Christ's Bride, supra note 6.
29. Cf. Hopper, supra note 19 at 1075; United Food, supra note 27 at 352.
30. New York Magazine, supra note 26 at 130.
31. Aids Action Committee of Mass. v. MBTA, 42 F.3d 1, 12 (1st Cir. 1994)
32. Hopper, supra note 19 at 1076.
33. Metro Display, supra note 2.
34. Id. at 1195.

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MCLE SELF-ASSESSMENT TEST

1. A city always violates the First Amendment if it makes content-based distinctions when it allows private advertising on its public property.

   ❑ True ❑ False

2. In Lehman, a majority of the United States Supreme Court held that commuters' right of privacy was an adequate reason, by itself, for the City of Shaker Heights to exclude political messages from the "car card" space in its rapid transit system.

   ❑ True ❑ False

3. The precedential value of the California Supreme Court's Wirta decision remains undiminished.

   ❑ True ❑ False

4. For First Amendment purposes, public property is classified as either a public forum, designated public forum or nonpublic forum.

   ❑ True ❑ False

5. The government must have a substantial state interest in order to enforce a content-based restriction on speech in a traditional public forum.

   ❑ True ❑ False

6. Cities enjoy more latitude to regulate private speech occurring in a nonpublic forum than they do private speech occurring in a designated public forum.

   ❑ True ❑ False

7. Government restrictions on private speech in a nonpublic forum are permissible as long as they are reasonable and viewpoint neutral.

   ❑ True ❑ False

8. The public forum status for streets and parks is contingent upon government intent.

   ❑ True ❑ False

9. When a court evaluates public forum status, the government entity's written policy for the property in question is a more significant indicator of intent than its actual practice.

   ❑ True ❑ False

10. The principal function of a property constitutes a relevant factor in a court's determination of the public forum status of that property.

    ❑ True ❑ False

11. The California Court of Appeal used the First Amendment's public forum doctrine to resolve California Constitution-based challenges to the Downey Unified School District's refusal to allow the Ten Commandments to be posted on a high school baseball field fence.

    ❑ True ❑ False

12. Of all the federal courts of appeals, the Ninth Circuit has deferred most to the managerial decisions of government entities that conduct private advertising programs.

    ❑ True ❑ False

13. The Ninth Circuit relied on the Lehman case to invalidate the City of Phoenix's decision to exclude noncommercial advertising from bus panels.

    ❑ True ❑ False

14. Nevada's Clark County School District succeeded in barring family planning service advertisements from its student newspapers, yearbooks and athletic programs.

    ❑ True ❑ False

15. The manner in which a government entity conducts a private advertising program often is determinative of public forum status.

    ❑ True ❑ False

16. A city's declaration that an advertising space is a nonpublic forum will be dispositive if the issue is raised in litigation.

    ❑ True ❑ False

17. In order to evaluate public forum status, the courts will rely heavily upon eligibility criteria established by a government entity.

    ❑ True ❑ False

18. When promulgating eligibility criteria for a private advertising program, a city should include a requirement that submissions must meet its determination of "good taste, decency and community standards."

    ❑ True ❑ False

19. Consistent enforcement of the eligibility criteria for a private advertising program is unnecessary to persuade a court that an advertising space is intended to be a nonpublic forum.

    ❑ True ❑ False

20. Public officials may lose their qualified immunity from damages liability by rejecting submissions to a private advertising program based on the viewpoint expressed."

    ❑ True ❑ False

Disability Discrimination Under FEHA

The Impact Of The Prudence Kay Poppink Act (Former A.B. 2222)

*By: Jo Anne Frankfurt, Esq., Sonya Smallets**

I. Introduction

On January 1, 2001, the Prudence Kay Poppink Act ("Poppink Act") (former A.B. 2222) became law [Stats. 2000, ch. 1049], amending California's disability discrimination provisions. In naming the Act, the California Legislature recognized the work and contributions of Prudence Kay Poppink. Ms. Poppink, who until recently was an Administrative Law Judge with the Fair Employment and Housing Commission ("Commission"), devoted much of her legal career to furthering the development of law and policy in the area of disability and employment. Through codified legislative intent and substantive amendments, the Poppink Act reflects the California Legislature's reaffirmation that the disability discrimination provisions of the Fair Employment and Housing Act ("FEHA") [Gov. Code § 12900 et seq.] are vital, strong, and independent of federal law.

This legislative reaffirmation of independence can be seen as a response to judicial interpretations of the federal Americans with Disabilities Act ("ADA") [42 U.S.C. § 12101 et seq.]. In recent years, federal courts have concluded that conditions such as cancer, epilepsy, and asthma are not disabilities under the ADA [see, e.g., EEOC v. R.J. Gallagher Co. (5th Cir. 1999) 181 F.3d 645 (cancer of the blood not a disability); Todd v. Academy Corp. (S.D. Tex. 1999) 57 F. Supp. 2d 448 (epilepsy involving weekly seizures not a disability); Muller v. Costello (2nd Cir. 1999) 187 F.3d 298 (asthma, when exacerbated by environmental irritant, severe enough to require hospitalization not a disability)].

As stated by California Senator Sheila James Kuehl, author of the Poppink Act, the new law clarifies that "California disability law provides protections independent from the ADA and that the ADA provides a floor of protection to Californians with disabilities, but not a ceiling" [Hearings on Assembly Bill No. 2222, before the California Assembly Committee on Judiciary (April 1, 2000) page 10]. Consistent with this legislative intent, FEHA differs from federal law when the ADA is inconsistent with California's more expansive approach.

This article addresses several key provisions of state disability discrimination law, highlighting how the Poppink Act modified prior law. Several areas are discussed in detail: the definition of disability; provisions governing accommodation and the interactive process; permissible medical and psychological examinations and inquiries; and applicable defenses. The article poses questions that are raised in disability discrimination cases, providing pertinent statutory, judicial, and administrative authority. The article also notes some of the ways in which FEHA, after the Poppink Act, differs from the ADA.

II. Does the Applicant or Employee Have a Legally Cognizable Disability Under FEHA?

Unlike race or sex discrimination laws which protect all people from discrimination on the basis of their race or sex, disability discrimination laws only protect people who are "disabled." Therefore, the analysis of any disability discrimination claim must begin with an evaluation of whether an employee or applicant is disabled within the meaning of the relevant statutory provisions. The Poppink Act made significant changes to FEHA's approach to this threshold question. These changes, and their significance in light of prior state law and current federal law, are analyzed in this section.

A. Does the ADA Definition of "Disability" Apply to a FEHA Case?

Prior to the Poppink Act, there had been confusion in California about the relationship between the ADA and FEHA, particularly with respect to the definition of disability. Some courts construed FEHA as coextensive with the ADA [see, e.g., Muller v. Automobile Club of Southern California (1998) 61 Cal. App. 4th 431, 440-43 (holding that the provisions of FEHA defining mental disability should be construed to be equivalent with the narrower provisions of the ADA despite the admitted differences in statutory language)]. The Poppink Act now makes clear that FEHA is an independent statutory scheme with added protections. Thus, new Government Code section 12926.1, subdivision (a), states:

> The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (Public Law 101-336). Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

This federal "floor of protection" is also explicitly set forth in Government Code section 12926, subdivision (l), a pre-Poppink Act provision which remains intact. Government Code section 12926, subdivision (l) expressly adopts the ADA in FEHA actions only to the extent that the ADA provides broader protection for people with disabilities than FEHA [Gov. Code § 12926, subd. (l)].

B. Does the Individual's Condition Constitute a "Physical Disability" or "Mental Disability," Within the Meaning of FEHA?

FEHA has separate definitions for "physical disability" and "mental disability," which diverge from the provisions of federal law. Government Code 12926, subdivision (k) defines a "physical disability" to include:

> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
>
> (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
>
> (B) Limits a major life activity. . . .
>
> (2) Any other health impairment not described in paragraph (1) that requires special education or related services.

This language was unchanged by the Poppink Act.

Unlike the definition of "physical disability," the pre-Poppink Act FEHA definition of "mental disability" did not provide that the condition or disorder must limit a major life activity in order to constitute a legally cognizable disability. The Poppink Act changed this, by amending Government Code section 12926, subdivision (i)(1) to define a "mental disability" as including the following:

> Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity (emphasis added).

The definition of "mental disability" also now includes "[a]ny other mental or psychological disorder or condition . . . that requires special education or related services" [Gov. Code § 12926, subd. (i) (2)].

1. A Condition Need Only "Limit" a Major Life Activity, Meaning "Makes Achievement Difficult"

A "physical disability" or "mental disability" is legally cognizable under FEHA if it "limits" a major life activity. The term "limits" was not statutorily defined prior to the passage of the Poppink Act. FEHA now provides that a condition limits a major life activity if it "makes the achievement of the major life activity [at issue] difficult" [Gov. Code §12926, subds. (k)(1)(B)(ii) & (i)(1)(B)].

This definition of "limits" reflects similar language of the California Supreme Court in American National Insurance Co. v. Fair Employment and Housing Commission, where the Court determined that a "physical handicap" was a physical condition which "makes achievement unusually difficult" [American National Insurance Co. v. Fair Employment and Housing Commission (1982) 32 Cal. 3d 603, 609]. While the American National Insurance case was previously referenced in FEHA [see former Gov. Code §12926, subd. (k)(4)], the Poppink Act deleted this reference, instead incorporating this concept into the statutory definition.

In contrast to FEHA, the ADA requires that a condition "substantially limit" a major life activity to constitute a legally cognizable disability [42 U.S.C. § 12102, subd. (2)(A)]. The intended consequence of FEHA's different approach is set forth in new Government Code section 12926.1, subdivision (c), which states:

> [T]he Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act.

2. "Limits" is Construed Without Regard to Mitigating or Corrective Measures

The Poppink Act provides that a determination of whether an individual's disability limits a major life activity must be made without regard to the beneficial effects of mitigating or corrective measures. Thus, the statutory definition of "physical disability" has been amended at Government Code section 12926, subdivisions (k)(1)(B)(i) to provide:

> "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

The Poppink Act similarly amended the definition of "mental disability;" the only difference is that under the definition of "mental disability," the term "prosthetics" is not included in the list of mitigating measures. [See Gov. Code § 12926, subd. (i)(1)(A)].

On the issue of mitigating or corrective measures, the California law clearly is different from the federal law, as explicated in the United States Supreme Court trilogy of cases holding that disabilities should be defined after consideration of any mitigating or corrective measures [Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471; Murphy v. United Parcel Service, Inc. (1999) 527 U.S. 516; and Albertson's, Inc. v. Kirkingburg (1999) 527 U.S. 555]. In Sutton, the United States Supreme Court concluded that, "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment" [Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471, 475].

California's departure from Sutton and its federal progeny prevents a "catch 22" which has occurred in some ADA cases. Under Sutton, if a mitigating measure sufficiently corrects a condition, there is no legally cognizable disability. As a result, an employer is free to make hiring, promotion, and termination decisions on the basis of the condition, even if the employee or applicant is capable of performing the essential job functions. On the other hand, if there is a legally cognizable disability because an individual's condition cannot be sufficiently

improved by mitigating or corrective measures, then the individual may not be able to perform the essential job functions even with accommodation, and therefore will not prevail in an ADA action.

The legislative intent to distance California from less protective federal law is codified at Government Code section 12926.1, subdivision (c), which states:

> Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990.

The California Legislature has further emphasized FEHA's departure from federal law by identifying as disabilities certain health conditions which, once mitigated or corrected, may not be legally cognizable disabilities under federal law. Setting forth a non-inclusive list of these conditions, new Government Code section 12926.1, subdivision (c), provides:

> Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease.

3. The Term "Major Life Activities" Is Broadly Construed

The Poppink Act provides that under FEHA the term "major life activities" shall be "broadly construed" and include "physical, mental, and social activities and working" [Gov. Code § 12926, subds. (k)(1)(B)(iii) & (i)(1)(C)]. New Government Code section 12926.1, subdivision (c) further provides that "under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

This approach is consistent with regulations promulgated by the Fair Employment and Housing Commission ("Commission"), which define the term as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" [Cal. Code of Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a)]. The regulations further provide that "[p]rimary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement" [Cal. Code of Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a)].

Although the statutory language of the ADA does not define major life activities, the Equal Employment Opportunity Commission's ("EEOC") regulations include a list of major life activities [29 C.F.R. § 1630.2, subd. (i)]. This list is comparable to the list in the Commission's regulations [see Cal. Code of Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2)(a)] and includes working as a major life activity [29 C.F.R. § 1630.2, subd. (i)]. Nonetheless, the EEOC regulations provide that in order to be substantially limited in the major life activity of working, one must be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities" [29 C.F.R. § 1630.2, subd. (j)(3)(i)]. The Supreme Court in Sutton went even further, noting that "there may be some conceptual difficulty in defining 'major life activities' to include work" [Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471, 492].

C. Does the Individual Have a Condition Which Has Been Statutorily Excluded from the Definition of "Physical" and "Mental" Disability?

Some conditions are, by statute, not legally cognizable disabilities. The ADA lists a number of these conditions and, prior to the Poppink Act, FEHA echoed the ADA language in this area. Thus, former Government Code section 12926, subdivisions (i) and (k), respectively, stated that the terms "mental" and "physical" disability do "not include conditions excluded from the federal definition of 'disability'" as defined in 42 U.S.C. § 12211. The ADA states that the definition of "disability" does not include: "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs" [42 U.S.C. § 12211, subd. (b)].

This former language in superseded Government Code section 12926, subdivisions (i) and (k) has been removed from FEHA and replaced with a shorter list of conditions which are not considered disabilities under FEHA. As amended, the state definitions of "mental disability" and "physical disability" do not include "sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs" [Gov. Code § 12926, subds. (i)(5) & (k)(6)].

D. Does the Individual Have a History or Record of Such a Disability?

When evaluating a FEHA disability discrimination case, the inquiry goes beyond whether the individual currently has a physical or mental disability. As a result of the Poppink Act, FEHA now expressly provides coverage for individuals with a record or history of a "physical disability" or "mental disability" which is known to the employer [Gov. Code § 12926, subds. (i)(3) & (k)(3) (emphasis added)]. The superseded FEHA statutory provisions did not expressly grant this coverage. The ADA definition also covers individuals with "a record of" a disability [42 U.S.C. § 12102, subd. (2)(b)].

E. Does the Employer Have a Perception or Belief that the Individual Has a "Physical" or "Mental" Disability?

Individuals who have neither a current nor a prior disability may still be protected from discrimination resulting from an employer's perception that the individual is, may, or will be disabled. Prior to the Poppink Act, FEHA contained statutory protection for people who were erroneously regarded or perceived by an employer as having a disability [see former Gov. Code § 12926, subd. (k)(3)], as the ADA does [42 U.S.C. § 12102, subd. (2)(C)]. The California Legislature intended to continue providing protection in this area, as stated in new Government Code section 12926.1, subdivision (b):

> It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or

mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

The Poppink Act reinforced FEHA's provisions both by revising the two existing definitions of perceived "physical disability" and by making the revised definitions applicable in settings which involve perceived mental disabilities as well as perceived physical disabilities.

1. Regarded or Treated as Having or Having Had a Condition that Makes Achievement Difficult

As amended by the Poppink Act, FEHA provides that individuals with perceived disabilities include those who are "[b]eing regarded or treated" by an employer "as having, or having had," any mental or physical condition that "makes achievement of a major life activity difficult" [Gov. Code §12926, subds. (i)(4) & (k)(4)].

This definition should be viewed in light of the Poppink Act's legislative intent language found in Government Code section 12926.1 , subdivision (d), which distinguishes the Poppink Act's definition of perceived disability from any contrary interpretation of the law in Cassista v. Community Foods, Inc. (1993) 5 Cal. 4th 1050. Government Code section 12926.1, subdivision (d) provides:

> Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends . . . to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.

Previously, there had been a question as to whether Cassista required proof that the perceived condition constitutes a condition which would amount to an actual disability under FEHA. Under the express language of the new statute, however, the employer must simply perceive that an individual has either a physical or mental "condition" which "makes achievement of a major life activity difficult" [Gov. Code §12926, subds. (i)(4) & (k)(4)].

2. Regarded or Treated as Having a Prospective Disability

Prior to the Poppink Act, FEHA expressly covered individuals who had no physical disability, but were regarded as potentially having a disability in the future [see former Gov. Code § 12926, subd. (k)(4)]. Now, FEHA covers individuals who are "regarded or treated" by an employer as "having, or having had" either a "disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment" or a "mental or psychological disorder or condition," which "has no present disabling effect" but may become a "physical" or "mental" disability as defined by FEHA [Gov. Code §12926, subds. (k)(5) & (i)(5)]. Thus, the Poppink Act made two amendments: it added "treated" to the definition and extended protections in this area to individuals with perceived mental disabilities.

F. Is a "Medical Condition," as Defined by FEHA, at Issue?

Under state law, applicants and employees are also protected from discrimination on the basis of a "medical condition," a FEHA term which applies to cancer and genetic characteristics. Government Code section 12926, subdivision (h) provides that the term "medical condition" means either:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.
(2) Genetic characteristics.

The Poppink Act broadened the definition of "medical condition" as it applies to cancer. Now superseded Government Code section 12926, subdivision (h) (1) had defined the cancer-related provisions of "medical condition" in a more limited manner as "[a]ny health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based upon competent medical evidence" (emphasis added). The Poppink Act did not change FEHA's protections against discrimination on the basis of genetic characteristics.

III. Has the Employer Complied with FEHA's Provisions Governing Accommodation?

Some disability discrimination cases involve unlawful employment practices similar to other types of employment discrimination claims, such as allegations of an unlawful failure to hire or termination of employment. Other cases involve the need for accommodation, a claim more specific to disability cases. The employer's duty to provide reasonable accommodation, which is a key component of protection for disabled employees and applicants, was not changed by the Poppink Act. Yet, the Poppink Act adds a new statutory obligation to help effectuate this protection: the employer must engage in a good faith, interactive process to determine an appropriate reasonable accommodation.

The following discussion reviews FEHA's reasonable accommodation provisions, referencing some recent judicial decisions on the contours of this duty. It then describes the new statutory provisions requiring that employers engage in an interactive process, particularly in light of differing federal law.

A. Duty to Provide Reasonable Accommodation

FEHA makes it an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee," unless such an accommodation would "produce undue hardship" [Gov. Code § 12940, subd. (m)]. This provision of FEHA was unchanged by the Poppink Act amendments. "[T]he employer's failure to reasonably accommodate a disabled employee is a violation of the statute in and of itself" [Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 256].

FEHA defines reasonable accommodation to include "making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities" and "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations" [Gov. Code § 12926, subds. (n)(1) & (2)].

This list of possible reasonable accommodations is not exhaustive [Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 948]. In addition to the above-listed reasonable accommodations, courts have held

that "[h]olding a job open for a disabled employee who needs time to recuperate or heal" is a reasonable accommodation. [Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 263; see also Hanson v. Lucky Stores, Inc. (1999) 74 Cal. App. 4th 215, 226 (finite leave of absence is a reasonable accommodation)]. Further, courts have concluded that reassigning a disabled employee to a vacant position requires more than allowing the employee to apply for other positions within the company; rather, it requires reassigning the disabled employee to any vacant position for which he or she is qualified, even if there are other candidates who are more qualified or who have greater seniority [Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 265; see also Spitzer v. The Good Guys, Inc. (2000) 80 Cal. App. 4th 1376, 1389]. The employer, however, does not have to create a new job for a disabled employee, displace another employee to create an opening for the disabled employee, or promote the disabled employee [Spitzer v. The Good Guys, Inc. (2000) 80 Cal. App. 4th 1376, 1389].

An employer is not required to provide a particular reasonable accommodation if it can establish that providing the accommodation would be an "undue hardship" [Gov. Code § 12940, subd. (m)]. FEHA defines undue hardship as involving "an action requiring significant difficulty or expense," considering the nature and cost of the required accommodation, the financial resources of the employer, and the nature and structure of the employer's workforce [Gov. Code § 12926, subd. (s) (listing the numerous factors relevant to an undue hardship inquiry)].

B. Duty to Engage in Good Faith, Interactive Process

While the employer's duty to provide reasonable accommodation to disabled employees and applicants is unchanged, the Poppink Act makes it expressly illegal for employers to refuse to engage in a good faith, interactive process when assessing possible reasonable accommodations [Gov. Code §12940, subd. (n)]. Specifically, FEHA now provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition" [Gov. Code § 12940, subd. (n)].

In defining the required interactive process, the Poppink Act explicitly incorporates the EEOC's interpretative guidance on the ADA, an appendix to the EEOC's regulations on Title I of the ADA. Thus, Government Code section 12926.1 subdivision (e) provides: "The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretative guidance of the Americans with Disabilities Act of 1990."

The EEOC's interpretative guidance contemplates that the employer and the disabled employee or applicant will engage in a flexible, interactive process to determine the appropriate reasonable accommodation [29 C.F.R. § 1630, App. A (Interpretative Guidance) § 1630.9]. This process may be informal when both the nature of the disability and the required accommodation are obvious to all parties. When neither the employer nor the employee has enough independent information to determine the appropriate reasonable accommodation, a more formal process may be required. In implementing a more formal process, an employer should: (1) analyze the employee's job to determine its essential functions; (2) consult with the disabled employee to determine the precise, job-related limitations imposed by the disability; (3) consult with the employee to identity potential reasonable accommodations and assess their effectiveness; and (4) implement the appropriate reasonable accommodation, considering the needs and preferences of both the employee and the employer [29 C.F.R. § 1630, App. A (Interpretative Guidance) § 1630.9].

FEHA's new provision, setting forth the failure to engage in the interactive process as a separate violation of state law, is significant in light of the conflicting approaches to this issue under federal law. Notably, the ADA does not provide that the failure to engage in a good, faith interactive process is a violation of federal law. The EEOC's implementing regulations do, however, impose this obligation on employers [29 C.F.R. § 1630.2, subd. (o)(3)]. Federal courts construing these regulations have reached different conclusions about the implications of employers' refusal to engage in an interactive process. Some federal courts have held that an employer does not violate the ADA for failing to do so and that the employer only violates the ADA by failing to provide a reasonable accommodation [Rehling v. City of Chicago (7th Cir. 2000) 207 F.3d 1009, 1015-16; Willis v. Conopco, Inc. (11th Cir. 1997) 108 F.3d 282, 285]. Other courts have held that while an employer's failure to engage in the interactive process is not in and of itself a violation of the ADA, it will typically preclude the employer from being able to obtain summary judgment on an employee's claim that the employer failed to provide a reasonable accommodation [Barnett v. U.S. Air, Inc. (9th Cir. 2000) 228 F.3d 1105, 1115-16; Taylor v. Phoenixville School District (3rd Cir. 1999) 184 F.3d 296, 317-18]. Courts taking the latter approach have emphasized that an employer should not be advantaged by its failure to engage in the interactive process and thus that juries are entitled to conclude that the interactive process may have led to an acceptable reasonable accommodation, even if the employee is not able to prove that such an accommodation exists in the context of the adversarial proceedings of a trial [Taylor v. Phoenixville School District (3rd Cir. 1999) 184 F.3d 296, 317-18].

IV. Has the Employer Required an Impermissible Medical or Psychological Examination or Made an Impermissible Medical or Psychological Inquiry?

The Poppink Act made significant amendments to FEHA's provisions governing medical and psychological examinations and inquiries. These new provisions are described below. Most of the Poppink Act medical and psychological examination and inquiry provisions track the comparable provisions of the ADA, although some new provisions build upon the provisions of the ADA to provide greater protection to job applicants [Hearings on Assembly Bill No. 2222, before the California Assembly Committee on Labor and Employment (May 3, 2000), page 3-4].

A. What Examinations and Inquiries Can Employers Make to Job Applicants Prior to a Job Offer?

FEHA, as amended by the Poppink Act, protects job applicants who have not yet received a job offer from medical and psychological examinations and inquires. An employer, prior to offering a job to an applicant, may not require the applicant to submit to any medical or psychological examination and may not inquire whether or to what extent the applicant is disabled [Gov. Code § 12940, subd. (e)(1)]. The employer, however, may ask an applicant to describe how the applicant would perform job-related functions [Gov. Code § 12940, subd. (e)(2)]. Further, the employer may respond to an applicant's request for reasonable accommodation [Gov. Code § 12940, subd. (e)(2)], thereby allowing the employer to engage fully in the interactive process with an applicant who has requested accommodation. These provisions track the ADA [42 U.S.C. § 12112, subd. (d)(2)].

The following three examples illustrate permissible and impermissible medical inquires made by an employer to a hypothetical hearing impaired applicant for a receptionist position:

Example: At the interview, the employer notices that the applicant is wearing a hearing aid. The employer may not ask the applicant if he is disabled, if he can hear without his hearing aid, or other similar disability-related questions.

Example: During the interview, the employer explains that one of job duties of the receptionist is to answer the telephone and respond to inquiries. The employer may lawfully ask the job applicant about his ability to do these tasks.

Example: When the employer asks the job applicant about his ability to respond to telephonic inquiries, the applicant explains that he can do so if he has access to an amplified headset. Because the applicant has stated that he will need an accommodation, it is lawful for the employer to ask the applicant for more information about the accommodation, such as how readily available such headsets are and how much they are likely to cost.

B. What Examinations and Inquiries Can Employers Make of Job Applicants After a Job Offer?

FEHA regulates examinations and inquiries following an offer of employment. After the employer offers a job to the applicant but before the applicant begins to work for the employer, the employer may require a medical or psychological examination or make a medical or psychological inquiry under the following circumstances: (1) the examination or inquiry is job-related and consistent with business necessity; and, (2) the employer subjects all entering employees in the same classification to the same examination or inquiry [Gov. Code §12940, subd. (e)(3)].

"As stated by California Senator Sheila Kuehl, author of the Poppink Act, the new law clarifies that 'California disability law provides protections independent from the ADA and that the ADA provides a floor of protection to Californians with disabilities, but not a ceiling.'"

Significantly, the ADA also provides that an employer may not require medical and psychological examinations or make medical and psychological inquiries of job applicants following a conditional offer of employment unless the employer requires medical and psychological examinations or makes medical and psychological inquiries of all entering employees in that job category [42 U.S.C. § 12112, subd. (d)(3)]. The Poppink Act provisions do not impose additional obligations on employers with respect to this criterion.

The Poppink Act does, however, go beyond the ADA in requiring that all examinations and inquiries be job-related and consistent with business necessity. The ADA does not require that that the examinations or inquiries made of all job applicants following a conditional offer of employment be job-related or consistent with business necessity. Instead, the ADA provides that if the medical and psychological examinations or inquiries screen out or tend to screen out individuals with disabilities, such examinations or inquiries are discriminatory unless they are job-related and consistent with business necessity [42 U.S.C. § 12112, subd. (b)(6)].

The following hypothetical examples illustrate impermissible medical examinations of job applicants who have received offers of employment.

Example: During the job application process, an applicant for a food server position tells the employer that she is diabetic because she will need a reasonable accommodation of periodic breaks to monitor her insulin levels. The employer offers the applicant a position conditioned upon a comprehensive general medical examination. The employer has never required such an examination of any of the other employees that it has hired. Under both the ADA and FEHA, the employer is not allowed to require that this applicant undergo such an examination when the employer does not require the same of other applicants.

Example: A job applicant applies for a position as an accountant. The applicant reveals to the employer that she had breast cancer twenty years ago but has not had any recurrences. The employer offers the applicant a job conditioned upon the successful completion of a general medical examination. Requiring an applicant to submit to a medical examination prior to beginning work as an accountant violates FEHA, because such an examination is not job-related and consistent with business necessity. However, such an examination would not violate the ADA unless it has the effect of screening out applicants with disabilities, and, if so, is not job-related and consistent with business necessity.

C. What Examinations and Inquiries Can Employers Require or Make of Existing Employees?

FEHA generally provides that an employer may not require an employee to submit to any mental or psychological

examination and may not inquire whether or to what extent an employee is disabled [Gov. Code § 12940, subd. (f)(1)]. An employer may, however, require examinations or inquiries that it can show to be "job-related and consistent with business necessity" [Gov. Code § 12940, subd. (f)(2)]. An employer may also conduct voluntary medical examinations of employees if such examinations are part of a health program available to its employees [Gov. Code § 12940, subd. (f)(2)]. These provisions track the provisions of the ADA [42 U.S.C. § 12112, subd. (d)(4)].

The following example illustrates a permissible medical inquiry by an employer to a current employee.

Example: An employee has successfully worked for an employer for five years as a clerk stocking shelves in a warehouse. Recently, the employer has begun to notice problems with the employee's performance. The employer orally reprimands the employee for his decreased productivity. The employee explains that he has been having problems at work because he has asthma, which has recently been aggravated by dust in the warehouse. The employer may respond to this statement by asking the employee questions necessary to determine if the employee has a disability and if the employee needs reasonable accommodation in order to be able to successfully perform the essential functions of his job.

V. Are There Any Applicable Defenses?

Because the Poppink Act makes clear that FEHA's provisions governing the definitions of disability must be broadly construed, there undoubtedly will be more emphasis in the future on the defenses available to an employer in a disability discrimination action. This is because a narrow interpretation of the definitional provisions can lead to dismissal of a case on the grounds that the employee or applicant is not disabled. Conversely, broader construction of the definitional provisions will result in more determinations that there is a legally cognizable disability, and, consequently, more focus will be on whether the applicant or employee can perform the essential functions of the job. Thus, knowledge of the statutory defenses in FEHA, which are unchanged by the Poppink Act, is essential.

The statutory defenses make clear that an employer need not hire or retain any employee who, even with reasonable accommodation, cannot perform the essential job duties or would endanger the employee or others. Specifically, FEHA does not require an employer to hire or employ individuals who are "unable to perform his or her essential duties even with reasonable accommodations" [Gov. Code §12940, subds. (a)(1) & (a)(2)]. Further, FEHA does not require an employer to hire or employ employees who cannot perform those duties, even with accommodations, in a manner that would not endanger his or her "health or safety or the health or safety of others" [Gov. Code §12940, subds. (a)(1) & (a)(2)].

Thus, a determination of the essential functions of the job is an important component of the defenses available to employers. The term "essential functions" is defined in Government Code section 12926, subdivision (f) to mean "the fundamental job duties of the employment position the individual with a disability holds or desires," excluding the "marginal functions of the position" [Gov. Code § 12926, subd. (f)]. The same subdivision lists factors to look at when evaluating whether a job function is essential and evidence which can be used prove whether a particular function is essential [Gov. Code § 12926, subd. (f)].

For reasons described above, there has not been extensive analysis of the defenses in recent California case law. For an idea of how the courts and Commission have, over the years, analyzed the defenses available to employers, see, for example, Sterling Transit Co. v. Fair Employment Practices Commission (1981) 121 Cal. App. 3d 791 and DFEH v. Southern Pacific Transportation Co. (1980) FEHC Dec. No. 80-33 [1980-81 CEB 18].

VI. Conclusion

This article has outlined some important issues in disability-based FEHA cases. Because the Poppink Act is a recent enactment which extensively clarifies and modifies previous disability discrimination provisions in FEHA, these issues, as well as others not explored here, await clarification by future case development.

Nonetheless, the Poppink Act represents a strong legislative commitment to eliminate workplace barriers faced by qualified individuals with disabilities. In light of the Act's broad provisions governing the definition of disability, it is likely that future cases will often move beyond the question of whether the individual has a legally cognizable disability and, instead, focus on a different inquiry — whether the applicant or employee can perform the essential job functions safely and effectively. As a result, the legal emphasis will return to what has perhaps been the cornerstone of disability law in California – to prohibit discrimination against individuals who have proven they can be productive members of the workforce.

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The late Prudence Kay Poppink, after whom the Poppink Act is named, was Administrative Law Judge with the Fair Employment and Housing Commission, and was recipient of the 2000 Public Lawyer of the Year Award.

Summer 2001 Legislative Report

*By: Debra A. Greenfield, Esq., and Joyce M. Hicks, Esq.**

AB 192

AUTHOR: Canciamilla

TITLE: State Bodies: Open Meetings

SUMMARY: Reorganizes and recasts the definition of state body for the purposes of the Bagley-Keene Open Meeting Act. Defines the term action taken to mean, among other things, a collective decision made by members of a state body, but does not define the term "meeting."

AB 237

AUTHOR: Papan

TOPIC: Eminent domain.

SUMMARY: Existing law provides a procedure to exercise the power of eminent domain to acquire property for a public use. This bill would require the final offer and demand to include all elements of required compensation, including compensation for loss of goodwill, and to indicate whether or not interest and costs are included.

AB 247

AUTHOR: Maddox

TOPIC: Eminent domain: houses of worship.

SUMMARY: Existing eminent domain law provides for the acquisition of property by public entities for purposes of public necessity. This bill would prohibit the exercise of eminent domain to acquire buildings, land on which they are situated, or equipment used exclusively for religious worship, if they are exempt from property taxes under the California Constitution.

AB 363

AUTHOR: Steinberg

TOPIC: Attorneys.

SUMMARY: Existing law, the State Bar Act, provides that the State Bar is governed by the Board of Governors that is authorized to formulate rules of professional conduct for persons licensed to practice law in this state. This bill would enact the Public Agency Attorney Accountability Act. It provides that every California public agency attorney who is a member of the State Bar, whether employed on the local, state, or federal level, should be provided adequate guidance to reasonably determine the circumstances under which he or she may properly seek to protect the public interest even at the risk of disclosing client confidences, through the adoption, on or before January 31, 2002, of a carefully balanced new rule of professional conduct.

AB 914

AUTHOR: Shelley

TITLE: Public Records

SUMMARY: Provides that notwithstanding provisions of existing law, an agency shall release, or a court, when judicial proceedings have been instituted, shall order the release of, any record not expressly prohibited from disclosure by a specific provision of law if withholding the record would seriously harm the public interest, public safety, or the constitutional rights of any person.

AB 1014

AUTHOR: Papan

TITLE: Public Records Act: Disclosure Procedures

SUMMARY: Requires state and local agencies to assist any member of the public to make a focused and effective request that reasonably describes an identifiable record by identifying records and information that may be responsive to a request, describing the information technology, environment, or physical location in which a record may exist, and providing suggestions for overcoming any practical basis of denying access to the information sought.

AB 1050

AUTHOR: Kehoe

TITLE: Local Agency Meetings: Closed Sessions

SUMMARY: Relates to the Ralph M. Brown Act under which the legislative body of a local agency may hold a closed session to grant authority to its negotiator regarding the purchase, sale or lease of real property. Requires that, prior to the initial closed session with its negotiator, a legislative body must hold an open and public session in which it deliberates issues related to the desirability of and any policy considerations regarding the transaction.

AB 1265

AUTHOR: Bill Campbell

TOPIC: Powerplants: California Environmental Quality Act.

SUMMARY: Existing law provides for the restructuring of California's electric power industry so that the price for the generation of electricity is determined by a competitive market.

This bill would declare the intent of the Legislature to enact a program that would stabilize statewide electrical grid reliability by expediting the CEQA process for projects relating to the construction of "clean" or "green" energy powerplants.

AB 1553

AUTHOR: Keeley

TITLE: Environmental Justice: Guidelines

SUMMARY: Requires the Office of Planning and Research, on or before January 1, 2003, to adopt guidelines for addressing environmental justice matters in city, county, and city and county general plans, and to hold one public hearing prior to the release of any draft guidelines, and one public hearing after the release of the draft guidelines. Requires that the hearings be held at the regular meetings of the Planning Advisory and Assistance Council.

AB 1629

AUTHOR: Pescetti

TITLE: Environmental Protection

SUMMARY: Expresses the Legislature's intent that a single unified code of

environmental protection statutes be established that would be administered by a single environmental protection agency.

SB 34

AUTHOR: Burton Johnson

TITLE: Political Reform Act of 1974

SUMMARY: Relates to the changes enacted by Proposition 34 which became operative on a certain date, with the exception of certain provisions pertaining to candidates for statewide elective office that become operative on or after a certain date. Limits this exception to those provisions of Proposition 34 that impose limitations on campaign contributions and voluntary expenditures by candidates, and that require the inclusion of candidates who accept voluntary expenditure limits.

SB 147

AUTHOR: Bowen

TITLE: Employee Computer Records

SUMMARY: Prohibits an employer from secretly monitoring the electronic mail or other computer records generated by an employee. Provides that an employer who intends to inspect, review, or retain any electronic mail or any other computer records generated by an employee shall prepare and distribute to all employees the employer's workplace privacy and electronic monitoring policies and practices.

SB 211

AUTHOR: Torlakson

TITLE: Redevelopment: Indebtedness

SUMMARY: Authorizes a redevelopment agency that adopted a redevelopment plan on or before a certain date to amend that plan to extend its effectiveness to pay indebtedness and receive tax increment revenues with respect to the plan for not more than 10 years if specified requirements are met, including the issuance of a letter by the Controller confirming that the agency has not accumulated an excess surplus of its Low and Moderate Income Housing Fund.

SB 411

AUTHOR: Perata

TITLE: Redevelopment Plans: Oakland

SUMMARY: Authorizes the City Council of the City of Oakland to extend, by ordinance adopted on or before December 31, 2002, prescribed time limits with respect to the Central District Urban Renewal Plan under specified condition. Such conditions include the issuance by the Controller of a letter confirming that the Redevelopment Agency of Oakland has not accumulated the excess surplus in its low and moderate income housing fund.

SB 439

AUTHOR: Monteith

TITLE: Environmental Quality: Homeownership: Employment

SUMMARY: Relates to the California Environmental Quality Act. Revises the State environmental policy to include the development and maintenance of a high-quality environment through homeownership, employment, and educational opportunities. Requires persons and public agencies involved in the environmental review process to seek input from local communities that may be affected by proposed projects.

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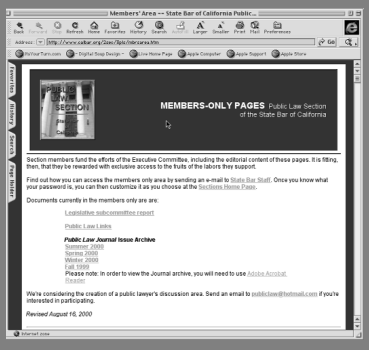

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Native-American Mascots In Public Schools & Colleges

Are They Worth Keeping?

*By: Phyllis W. Cheng, Esq.**

Introduction

The use of Native American mascots is pervasive at every level of competitive team sports–professional, college, and high school. Common mascots and team names include "redskins," "braves," "redmen," "blackhawks," "wahoos," "chiefs," "savages," "Indians," and "injuns."[1] The typical mascot is painted in red tones, sometimes as "Chief Wahoo," dances an "Indian dance" on the sideline, leads the crowd in a rallying "tomahawk chop" or other sham rituals, and rides a pony bareback onto the field.[2] In each team's home community, souvenirs bearing mock Native American logos and slogans are pervasive.[3] As of 1995, some 97 colleges and universities and countless elementary-secondary schools across the county use nicknames and mascots alluding to Native Americans.[4]

Many Native Americans find these depictions racially and ethnically offensive, and stereotypical of their race as savage warriors.[5]

Even though the focus of this analysis is on high schools, it is also important to review the use of Native American mascots by college and professional sports teams, because elementary-secondary schools tend to mirror them.

Case Law, Litigation, and Voluntary Actions

High Schools

For forty years, the use of racially offensive mascots for sports teams has been strenuously debated. In the 60s and 70s, during the early days of the civil rights movement, the use of Confederate Rebel high school mascots, which perpetuated black-white racial tensions, dominated the discussion. Protests and litigation over the Rebel mascots led to their eventual elimination in most cases.[6] The 80s were a period of general dormancy for the mascot debate.[7]

From the 90s to the present, however, the high school mascot controversy has revived and shifted its focus to Native American mascots, prompting protests and school board reviews of such mascots. For example, in 1992, the Wisconsin Attorney General stated in a published opinion that although Native American mascots are not per se violations of a state statute, an individual mascot could be found to be a form of discrimination, regardless of intent, if a hostile environment is created.[8] Subsequently in 1993, the Wisconsin Legislature passed a resolution requiring all school boards in Wisconsin to review stereotypical depictions of Native Americans in school mascots.[9] As a result, by April of 1994, Wisconsin's Superintendent of Instruction sent letters to all school districts in Wisconsin that still use Native American mascots to stop using them.[10] Similarly, there is a current movement in Maine to eliminate the use of Native American mascots in some of its high schools.[11]

In March of 1999, the U.S. Justice Department launched an investigation into whether a North Carolina high school violated the civil rights of Native American students by creating a "racially hostile environment" by its use of the names "Warriors" and "Squaws" for its teams.[12] The school ultimately retained "Warrior" but eliminated "Squaw," since the term means either prostitute or a vulgar term for female genitalia in some Native American languages.[13]

Colleges and Universities

Recently, colleges and universities have also confronted the controversy over Native American mascots. In response to Native Americans' protests, many colleges have eliminated the use of such mascots, and have refused to play against teams which employ them.

In the early 70s, Dartmouth College and Stanford University were among the first to abandon the "Indian" as a mascot.[14] In 1991, Big Ten Conference member, the University of Iowa, asked rival the University of Illinois' Fighting Illini not to bring its mascot, Chief Illiniwek, to its campus.[15] In the same year, the University of Minnesota, after a protest over University of Illinois' Chief Illiniwek mascot, the university chose to no longer play non-conference home games against schools with Native American mascots.[16] Subsequently in 1993, after Native Americans protested a game against the Alcorn State (Mississippi) University's ASU-Scalping Braves, the University of Wisconsin adopted a policy barring the scheduling of regular season games against teams with "inappropriate mascots."[17] However, Wisconsin University's policy does not apply to its traditional foes such as the North Dakota Fight Sioux and Big Ten Conference rival the Illinois Fighting Illini.[18] Thereafter, in 1994, Marquette University followed suit and abandoned its First Warrior mascot and symbol (originally conceived as a grinning, tomahawk-swinging Indian caricature named "Willie Wampum") in favor of the Golden Eagle as its new mascot.[19] Closer to home, San Diego State University has announced that its Monty Montezuma mascot will have to abandon its spear-twirling ways and behave in a manner to be determined by experts on Aztec culture by 2003.[20]

Professional Sports Teams

At the professional sports level, the use of the "The Washington Redskins," "Redskin," and "Redskinette" trademarks was canceled in 1999 by the Trademark and Appeals Board "on the grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute" in violation of section 2(a) of the Trademark Act.[21]

In a related decision, the Utah Supreme Court held in 1999 that the opinion of a reasonable objective person must be employed in determining whether license plates with the word "redskin," in honor the Washington Redskins team, was derogatory.[22] The court stated:

> "It is hoped that one day all offensive and derogatory language, speech, and symbols, predicated on race will be completely eradicated from our culture. In the meantime, public officials have the obligation to ensure that they are not used with the imprimatur of the State."[23]

The momentum nationally has shifted in favor of Native American protestors at the high school, college and professional sports levels. The interest in eliminating the use of offensive Native American mascots in high schools is highest, because compulsory schooling laws make minors captives of the more restrictive elementary-secondary school environment. In colleges and universities where students have a choice of attendance, the First Amendment interests in freedom of expression must be balanced against the offensive use of Native American mascots. Finally, at the professional sports level where teams are privately owned, the use of offensive Native American mascots may be protected by the First Amendment as commercial speech, regulated only by the rules on registration of trademarks and the like.

Federal Statute: Title VI of the Civil Rights Act

The primary federal statute applicable to elementary-secondary schools and colleges in eliminating the use of offensive Native American mascots is Title VI of the 1964 Civil Rights Act.24 Title VI states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[25]

Under Title VI and its implementing regulations,[26] the Office for Civil Rights (OCR), U.S. Department of Education, adopted an investigative approach to follow when investigating issues of discrimination against students based on racial incidents, such as the use of offensive Native American mascots.[27] This investigative approach incorporates into Title VI the "hostile Environment" analysis long used by the Equal Opportunities Employment Commission to weight claims of harassment and discrimination in employment under Title VII of the Civil Rights Act.[28]

To establish a violation of Title VI under the hostile environment theory, OCR must find, based on the totality of the circumstances, that (1) a racially hostile environment which was sufficiently severe, pervasive or persistent existed, (2) the school had actual or constructive notice of the racially hostile environment, and (3) the school failed to respond adequately to redress the racially hostile environment. An alleged harasser need not be a school agent or employee because liability under Title VI is premised on a school's general duty to provide a nondiscriminatory educational environment.[29]

Should a Title VI violation be found, a school district or college may lose its federal funding. In order to bring a private action under Title VI, the plaintiff must be an intended beneficiary or, or applicant for, or participant in a federally funded program.[30]

However, a recent U.S. Supreme Court decision in Alexander v. Sandoval holds that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI.[31] Ruling 5 to 4 on § 602 of Title VI, the court held that Congress had limited the kind of private lawsuits that can be brought under the act to enforce a ban on discrimination in programs that receive federal money. Suits could be brought only for intentional discrimination on the basis of race and national origin, and not for policies that have a discriminatory impact. The case before the court was a class-action lawsuit contending that the State of Alabama violated federal law by requiring applicants for drivers' licenses to take the written examination in English. Alabama, which like all states receives federal law enforcement and highway money, is the only state to limit its drivers' license exams to English.[32] Two lower federal courts ruled that the policy had the prohibited effect of discriminating on the basis of national origin.

State Statutes

There are several state statutes applicable to an action against a school district sponsoring offensive Native American mascots.

Education Code section 200 et seq. is a comprehensive statutory scheme which prohibits sex, ethnic group identification, race, national origin, religion, mental or physical disability discrimination in education in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. Section 200 et seq. also bars discrimination of any basis that is contained in the prohibition of hate crimes under Penal Code section 422.6, subdivision (a). The provisions of this law are applicable to all educational institutions located in California which receive or benefit from state financial assistance or enroll students who receive state financial aid. Therefore, many private educational institutions are subject to the requirements of this legislation.

Education Code section 233 provides that the State Board of Education shall adopt policies, guidelines and curricula toward creating a school environment free from discriminatory attitudes, practices, and acts of hate violence. It further requires the State Board of Education to revise the school curriculum to include human relations education, with an aim to fostering an appreciation of the diversity of California's population and discouraging the development of discriminatory attitudes and practices.

Education Code section 233.5 provides that each teacher shall endeavor to impress upon the minds of the pupils the principles of moral justice free from discriminatory attitudes, practices, events or activities in order to prevent acts of hate violence.

Education Code sections 250-253 require educational institutions to submit assurances of compliance reports and to conduct compliance reviews pursuant to receipt of state financial assistance or state student financial aid.

Education Code sections 260, 261, and 262.3 along with Education Code sections 66292-66292.2 provide for remedies, including freedom from discrimination, filing of discrimination complaints, appeals and civil law remedies.

Education Code 262.4 provides for the enforcement of this act through a private civil action.

Education Code section 51500 prohibits teachers and school districts from instructing or sponsoring any activity which reflects adversely upon persons because of their race, sex, color, creed, heredity, national origin, or ancestry. It is unclear whether this section provides for a private right of action.

Government Code section 11135 et seq. prohibits discrimination based on ethnic group identification, religion, age, sex, color, or disability in any program or activity that is funded directly by the state or receives any financial assistance from the state. Violation of this section results in the loss of state funds.

Conclusion

In conclusion, there is a sea change in support of eliminating offensive Native American mascots from use by high school, college and professional sports teams. The interest is highest in elementary-secondary schools, where students are captives to institutionally sanctioned school activities. A growing body of case law finds that the use of Native American mascots is both offensive and degrading to a reasonable person. As a result, there is already a trend for school boards to review their policies and practices, and to replace Native American mascots with non-offensive themes. Finally, where such representations create a hostile environment, both federal and state statutes provide for enforcement of laws to combat such offensive representations of Native Americans.[33]

Driven by both changing social norms and remedies provided under the law, stereotyped Native-American mascots will likely fade from the sports fields and stadiums of our public schools and colleges.

Endnotes

1 See, generally, Douglas & Cummings, "Lions and Tigers and Bears, Oh My" or "Redskins and Braves and Indians, Oh Why": Ruminations on McBride v. Utah State Tax Commission, Political Correctness, and the Reasonable Person 36 Cal.W.L.Rev.11 (2000); Comment, Cancellation of the Washington Redskins' Federal Trademark Registration: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism? 10 Seton Hall J. Sports L. 389 (2000); Notes, A Public Accommodation Challenge to the Use of Indian Team Names and Mascots in Professional Sports 112 Harv.L.Rev. 904 (1999); Note, Native American Mascots, Schools, and the Title VI Hostile Environment Analysis 1995 U. Ill. L.Rev. 971 (1995); Comment, The Mascot Name Change Controversy: A Lesson in Hypersensitivity 5 Marq. Sports. L.J. 141 (1994).

2 Id.

3 Id.

4 See, supra, note 1, 1995 U.Ill.L.Rev. 971, note 112.

5 Id.

6 See, e.g., Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) [black students' class action suit in which injunction was denied but where Indiana high school ultimately volunteered to change its Confederate Rebel mascot to a cannon, but kept the name "Rebel"]; Augustus v. School Board of Escambia County, Fla., 507 F.2d 152 (5th Cir. 1975) [black students' class action suit where Florida High School was temporarily enjoined to use the Rebel mascot]; Crosby v. Holsinger, 852 F.2d 801 (4th Cir. 1988) [upheld principal's right to ban use of "Johnny Reb" mascot, which led to school going by "Rebels" without any mascot].

7 See, supra, note 1, 5 Marq. Sports L.J.,141, 152-153.

8 See, e.g., 25-92 Ops.Wis.Atty.Gen. (1992).

9 1993 WI A.J.R. 27.

10 See, supra, note 1, 5 Marq. Sports L.J. 141.

11 Cohen, Activists Wants Mascot Change, Portland Press Herald (Jan. 12, 2001) [potential lawsuit against Maine school districts for use of "Redskins" for sports teams].

12 See, supra, note 1,10 Seton Hall J. Sports L. 389, note 49.

13 Ibid.

14 See, supra, note 1, 5 Marq. Sports L.J. 141, 152-153 and note 77.

15 Id. at p. 157 and note 108.

16 Id. at p. 157 and notes 106-107.

17 Ibid.

18 Ibid.

19 Ibid. at pp. 153-155 and notes 78-96.

20 Monty Makeover Ordered at SDSU, San Diego Union Tribune, May 16, 2001.

21 Harjo v. Pro-Football, Inc. Cancel. No. 21,069 to Reg. Nos. 1,6060,810; 1,085,902; 987,127; 986,668; 978,824; and 836,122 (1999) [1999 TTAB LEXIS 181; 50 U.S.P.Q.2d (BNA) 1705], at *157.

22 McBride v. Motor Vehicle Division of Utah Tax Com. 977 P.2d 467 (1999).

23 Id.

24 42 U.S.C. § 2000d (2000).

25 Id.

26 34 C.F.R. § 100.1.

27 Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed.Reg. 11448 (1994).

28 See 29 C.F.R. § 1604.11 (1993).

29 See, supra, note 26.

30 See 42 U.S.C.S. § 2000d (2000); Simpson v. Reynolds Metals Co. 629 F.2d 1226 (1980 CA7 Ill.).

31 Alexander v. Sandoval, __ U.S. __ [121 S. Ct. 1511; 149 L. Ed. 2d 517; 2001 U.S. LEXIS 3367] (April 24, 2001).

32 Id.

33 However, the mere existence of a Native American mascot, without more, is not necessarily actionable.

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A Message From The Chair

By Henry D. Nanjo, Esq.

Happy Summer! This is the time for many of us to take a well-deserved break, however the work of the public lawyer and the section continues on. This issue should be making its way to you shortly before the State Bar's Annual Meeting. This year, in Anaheim, home of Disneyland. I hope some of you are combining business and pleasure.

The Public Law Section has three substantial programs to follow up on our fantastic program with Department of Insurance attorney, Cindy Ossias. Those who attended the session last year, kept going for some time past the end of the program. A good sign for any MCLE program. Our thanks to Cindy for sharing her experiences and perspectives. This year's programs includes:

A program called "The Political Reform Act and Doing Business with the Capitol or City Hall." The program will explore the gray lines between campaign contributions, conflicts of interests, and lobbying. This program is co-sponsored with the California Political Attorneys Association and will discuss useful information that could be shared with a myriad of clients. If you firm or your clients have contact with public or political entities, this program is for you. [Friday, Sept. 7, 2001, 2:15 p.m. to 4:15 p.m.]

Another very timely program is "Recent Developments in Affirmative Action Programs." This program will discuss in the current state of the law, in light of Hi-Voltage Wire Works v. City of San Jose and Proposition 209, as it is currently interpreted in California. If your practice involves contracts with public entities, construction or other related issues, this is the program for you. [Sat., Sept. 8, 2001, 11:00 a.m. to 12:00 noon]

Finally, our popular program has been expanded and updated, Discovery of Peace Officer Personnel Records and Pitchess Motions is now a three-hour program and should make you a virtual expert in the discovery of peace officer personnel records. [Sat., Sept. 8, 2001, 2:15 to 5:45 p.m.].

And don't forget to join us at the Public Lawyer of the Year reception on Saturday evening. Unfortunately, due to a work-related conflict, I will not be able to attend the Annual Meeting this year. However, please feel free to e-mail me with your comments, questions or anything else related to the Public Law Section. My e-mail address is hnanjo@saccounty.net.

This issue of the Public Law Journal in addition to the Summer Legislative Report by Debra Greenfield and Joyce Hicks, some interesting and timely articles. As space and restrictions in cities and other areas increase, there is more incentive to put private advertisements on public property. The article by Terence Boga discusses this, and you can get MCLE credit as well. Our editor Phyllis Cheng has an interesting article on Native-American mascots in public schools and colleges. What is acceptable? And finally, the impact of legislation named after our Public Lawyer of the Year for last year (Prudence Kay Poppink) is examined by JoAnne Frankfurt and Sonya Smallets.

Finally, as my term as Chair of the Executive Committee of the Public Law section draws to a close, I would like to thank all of you who participated and supported in the section. Whether you attended an MCLE class, was a member of the Section, a member of the Executive Committee or was one of the many people necessary to make the Section "run," a deep and heartfelt…Thank YOU! Remember to contact me at hnanjo@saccounty.net.

Straw Poll

In the last issue of the Journal I tried to take a straw poll. I have not received very many responses as of the writing of this message so I set out the questions below. If you would like to e-mail your responses to me, I would still like to get the results to you, so we know who we are.

The questions are:

- Are you in a private firm or government office?
- In what areas of the law do you practice?
- What public law topics are of interest to you?
- Do you consider yourself in a small, medium or large office?
- Would you be willing to contribute time or articles to the Public Law Section and its Journal, and what would you be willing to do?
- Any complaints or criticisms? Please try to make them positive.

Please respond to:
hnanjo@saccounty.net.

The Public Law Section Programs and Events

The Public Law Section of the State Bar of California will be sponsoring the following programs and events at The State Bar Annual Meeting, September 6-9, 2001 at the Hilton Hotel in Anaheim:

Friday, September 7, 2001
2:15pm - 4:15pm "Dealing With City Hall - Conflicts of Interest"

Saturday, September 8, 2001
11:00am - 12:00 noon "Recent Developments in Affirmative Action Programs"

Saturday, September 8, 2001
2:15pm - 5:45pm "Brady, Pitchess & Peace Officer Personnel Records."

Please join us on Friday, September 7 at 4:30p.m. for the "Public Lawyer of the Year" Reception: Honoree Jayne E. Williams of Meyers Nave Riback et al, San Leandro

Registration Information will be mailed June 1, 2001.

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